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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

THE STATE OF ARKANSAS,
Complainant,

vs. No. 2, Original

THE STATE OF TENNESSEE,
Defendant.

REPLY BRIEF FOR COMPLAINANT

CARUTHERS EWING,
Solicitor for State of Arkansas.

J. S. UTLEY,
Attorney-General of State of Arkansas.

EWING, KING & KING,
Of Counsel.

TOOF-MEMPHIS

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THE STATE OF ARKANSAS,
Complainant,

vs. No. 2, Original

THE STATE OF TENNESSEE,
Defendant.

REPLY BRIEF FOR COMPLAINANT

We wrote an elaborate brief on the defendant's exceptions which, if it served no other purpose, caused defendant's learned counsel to write a good deal.

There has been printed, at defendant's request, a "Supplemental Report of the Commissioners." This comprises certain maps which throw no additional light on any disputed question of fact.

The clamor for these maps and the references thereto might result in confusion.

(1) The Burke map (p. 3) is brought in but it was already before the Court. (P. 509).

(2) There is also brought in a duplicate or copy of the Humphreys survey (p. 7). This appears at page 510 of the original report.

(3) A copy of the Suter map is also exhibited (p. 8), but that was already in the record. (P. 506).

(4) Chart 18 of the Mississippi River Commission is brought in (p. 9), but it was already in the record (p. 513). The chart exhibited throws no light on any matter before the Court. Some lines are drawn on it, but they are unimportant. The lines represent Capt. Chas. Le Vasseur's idea of conditions "from 1823 to 1847." (Cissna v. State, Record 427, folio 591). Capt. Le Vasseur would not vouch for his own drawings, as they related to a time immediately preceding the cut-off, north of 35 degrees 26 minutes. (Cissna v. State, Record p. 460, folio 643).

Exhibit No. 3 to Capt. Le Vasseur's deposition is also brought to the Court's attention (p. 8). This was supposedly a reproduction of other maps. Cross-examination of Capt. Le Vasseur showed that two maps produced by him as reproductions were not such in fact.

Here is the record on this Exhibit No. 3:

> "Q. 35. Will you file that map as Exhibit No. 3 to your deposition?
>
> A. I do." (p. 425)
>
> "Q. 2. By whom were Exhibits 3 and 4 made?
>
> A. They were made by a young man who used to be employed temporarily as drafts-

man in the U. S. Engineer's office, named Arlage." (p. 468)

"Q. 6. Since giving your deposition, then, you have found that Exhibits 3 and 4 to your deposition, are totally incorrect?

A. I would not say totally, but incorrect at some points.

Q. 7. Have you examined these maps in order to find at what points they are incorrect?

A. A month ago I made such examinations. Mr. Biggs, counsel for the State of Tennessee, states that after it was ascertained that maps Exhibits 3 and 4 were not correct copies and enlargements of the maps, in every particular, that they will not be relied upon by the State of Tennessee on the hearing of this cause for any purpose whatsoever."

(P. 469. Record, Cissna v. Tenn.)

The Court can get little help from an admittedly incorrect map.

To prevent confusion it might be well to state that the Le Vasseur caricatures were based on other maps and a survey by George de Beughem. He testified:

"Q. 29. Your recent survey does not throw any light whatever on what was the middle of the river of 1874?

A. I don't think it does."

(P. 489. Record, Cissna v. Tenn.)

We are curiously concerned only with "the river of 1874," and the surveyor said his survey "does not throw any light whatever" on the question before this Court.

Another map is produced (p. 11). This is a reproduction of Dean's Island as of 1823, based on a survey by G. L. Clothier, adopted by J. A. Martin and mapped by J. A. Green. It is not illuminating. It shows where Mr. Green thought the Tennessee bank of 1876 ought to be. He said, however, that "even as far back as in the eighties" he did not believe the center of the river of 1876 could have been located. (Record, pp. 386-387, Fol. 653).

The only other map is Sheet No. 7 of the Mississippi River Commission, published in 1891 (p. 12). This was already in the record (p. 508).

Mr. Bentley simply took Sheet No. 7 and located on it the lines run by Maj. Humphreys:

> "Q. What is this drawing that you have made on the map as published by that Mississippi River Commission?
>
> A. It is a reduction from Maj. Humphreys' survey." (Rec. p. 372, Fol. 625).

We are unable to understand why these maps or so-called maps were used to delay the hearing or encumber the record. The information imparted by them (except as one is admittedly erroneous), was already in the record.

Defendant's learned counsel refers more than once to "Exhibit 3 to Le Vasseur's deposition" p. 53), but this is admittedly out of joint, as already pointed out.

Reference is also made to Exhibit No. 9 to Le Vasseur's deposition (p. 54), but it ought to be understood that this was simply a delineation of lines as shown in 1823 and by Col. Suter's reconnoissance. (Cissna v. State, p. 427, folio 591). The Court ought to clearly understand what Mr. Le Vasseur had to say of this map:

> "On the map, Exhibit No. 9, the bank of Barney Chute is indicated as it was in 1823. Between 1823 and 1874 some changes of Barney Chute may have taken place. This map, Exhibit No. 9, the changes which may have occurred on shore line of McGavock's or Barney Chute, are not indicated, as the work done on this map was not pertaining to Barney Chute or the river proper. The intersection of 90-03 and 35-27 map to the north or south of that chute, according to the years, which may be due to changes in that chute during such period, changes which are not retraced by me as the work I was in charge of did not require me to re-trace the different shore line of the chute."
>
> (Rec., Cissna v. State, p. 467).

In discussing this evidence defendant's learned counsel seems to think that Capt. Le Vasseur located "the middle of the channel prior to the cut-off,"

whereas we understand that it is the insistence of defendant that the "middle of the channel prior to the cut-off" cannot be located. The Commission was better able to locate the line than Mr. Le Vasseur. Among his many virtues one cannot find accuracy of statement or work. We really thought that this cartoonist had faded from the picture. His evidence, however, is quite unimportant.

Attention is called by defendant's learned counsel to Exhibit D to the deposition of Maj. Humphreys and it is said this—

> "gives Mr. Humphreys' idea of the low water line of 1876 on the Tennessee side, which is east of the Trigg tract and shows, as found by the Supreme Court of Tennessee, and the United States Circuit Court of Appeals, that the 131 acres in the northeast part of this Trigg tract was unquestionably in Tennessee at the time of the cut-off." (P. 54, Brief).

Maj. Humphreys never gave and was never willing to try to give his "idea of the low water line of 1876."

On the exhibited map (p. 7 of Supplemental Report) is a sketchy line "supposed low water line 1876," but this was placed there by another witness and not by Maj. Humphreys.

We might supplement what we have quoted from Maj. Humphreys' evidence:

> "Q. Have you undertaken to draw on the map the river of 1876?

A. No, sir; I have not.

Q. Were you informed as to where the river was in 1876?

A. No, sir; I was not." (Rec. p. 246)

"Q. You do not undertake to say that that was the river bank of 1876?

A. I do not.

Q. Where, then, was the river of 1876?

A. I do not know." (Rec. p. 252).

"Q. 19. And this map is not drawn with a view to locating the middle of the river of 1876 at all?

A. Not at all." (Rec. p. 260).

It seems idle to say that Maj. Humphreys located the middle of the river of 1876, when, time and time again, he says he did not.

Defendant says, in excepting, that Maj. Humphreys swears—

> "that no surveyor, however familiar he might be with conditions, could locate with any degree of certainty the middle of the channel of commerce as it was in 1876 prior to the cut-off." (Exceptions p. 5).

If the above statement is accurate, the Court can get no help from Maj. Humphreys. We do not think the statement accurate. Maj. Humphreys simply said that as he had not considered the river of 1876 at all, he could not draw it on a map which had to do with conditions as they existed in 1823.

As we understand the insistence of Tennessee, it is that the boundary line between these states cannot be settled. This would present a lamentable situation. It would result in confusion and disorder. The line, as run, may not be just exactly where it ought to have been run, but even if this be conceded, the line ought to be adopted as the Commission ran it unless some other line is indicated which will more nearly approach the true line. Tennessee simply says, in effect, that the real boundary cannot be determined. Tennessee says that the Commission did not run the line where it ought to have been run—but does not tell us where it ought to have been run.

It is said at pages 12-13 of the brief for defendant:

> "In this exception the defendant insists that the Commission should have reported that the middle of the channel of commerce as it existed immediately prior to the cut-off could not be located with reasonable certainty," etc.

This is but assertion and, if true, leaves everything in a muddle. The whole argument is that Tennessee does not think the real boundary line can be established. The Commission thought otherwise, and the line, as run, is the one supported by ample and convincing evidence.

We insist that there is no showing of any fact which ought to stand in the way of a confirmation of the report.

All persons must admit that the boundary line between the States ought to be fixed and settled.

AS TO COSTS

The plaintiff insists that the proper costs of this case ought to be paid by the parties—each paying one-half—except the costs incident to printing the Commissioners' Report. The necessity for printing this report arose because Tennessee wanted to except thereto. With profound respect for defendant's learned counsel, we say that the exceptions are frivolous. They may be fairly summarized as follows:

1. Complaint is made that the Commissioners marked on a map the middle of the river as Colonel Suter placed it, and thereafter took much proof to see if Colonel Suter had the thing right. This course was sensible and proper. It does not even tend to show that the line was improperly placed.

2. The claim is made that the exact center of the channel of the river of 1876 cannot now be located.

The Commission said it was able to locate it, and the opinion of a few persons that they could not do it is of no importance.

3. The claim is that the line ought not to be run where the Commission ran it, but somewhere else—without any sort of effort to tell

where the line ought to have been run—or that it ought not to be run at all.

No mass of words can disguise that the exceptions are frivolous, and we insist that defendant ought to pay all of the costs incident to the exceptions.

If any serious question was presented by the exceptions of defendant it might be proper to make Arkansas pay half of the expenses incident to exceptions by Tennessee.

The whole case, as presented by Tennessee, is that the Commission was unable to do that which it avows on satisfactory evidence that it was able to do, to-wit, run the line as directed by this Court.

In the brief and argument filed in support of the exceptions, the Court will find ten pages taken up with the proposition that a tentative line was plotted, after careful survey, following the Suter map, and that evidence was thereafter heard with respect to the accuracy of this tentative line. The Commission ought to have pursued this course. In other words, the Commission, from personal observation and investigation, believed the Suter reconnoissance was about the nearest approach to exact accuracy that was available. This was placed on a map reflecting a survey of the whole territory and a large amount of evidence was taken so that these lines could be addressed to the attention of witnesses.

This proposition presented by Tennessee has no relation to any substantial right.

Many pages are taken up in discussing the alleged impossibility of locating with reasonable certainty the middle of the channel of commerce as it existed immediately prior to the cut-off. In discussing this question the Court will find much use of the evidence of Mr. G. J. McSpadden, a lawyer. Learned counsel for Tennessee goes so far as to quote Mr. McSpadden's construction of the evidence of Col. Suter. (Brief, p. 19).

The Court is furnished six pages of printed matter to prove that the Commission admitted that the Suter map was the best evidence it had of the location of the channel in 1876. The Court is familiar with what the Commission said on this subject. The Suter map was said by the Commission "to be relatively correct" and that this reconnoissance was about as good evidence as could be obtained as of the date of the making of the reconnoissance.

We see nothing wrong with this and there is no excuse for copying what Mr. McSpadden said as to the evidence of Col. Suter.

In this connection it is said that Capt. Winslow "declared that he could not plat the steamboat channel, at the time he testified, from any information which he had in the Government office. (Rec. p. 87)." (Brief, p. 37).

This is but a sample of propositions submitted to this Court. No one pretends that the Commission went to the office of Capt. Winslow and undertook to "plat the steamboat channel." So, even if Capt.

Winslow had made the statement attributed to him, it is frivolous to advert to that evidence. Capt. Winslow made no such statement, however. The reference is to page 87 and exactly what Capt. Winslow stated is as follows:

> "Q. Could you now, from the information filed in your office, plat the steamboat channel from St. Louis to Memphis?
>
> A. No, I could not.
>
> Q. Then, so far as being able to show the channel of the river, your office is powerless?
>
> A. Yes, it is in a general way.
>
> Q. That is not the purpose of your office?
>
> A. No, that is not its purpose; while it is not in the line of my duty to obtain it, I may sometimes do so, but it is not our object to get such information."

Because Capt. Winslow had nothing in his office to "plat the steamboat channel from St. Louis to Memphis," does not even remotely tend to establish that the Commission appointed by this Court could not locate "the middle of the main navigable channel as it existed at the time the current ceased to flow therein" as the result of the Centennial Cut-off.

Much space is taken up discussing the proposition that —

> "Col. Suter himself admits that his map was not an actual survey, and was not made with

> any idea of determining anything accurately by metes and bounds, but was merely a sketch of general conditions." (Brief, p. 38).

Col. Suter explained that the river at the point in question was gone over four times:

> "This particular part of the river which you allude to was passed over four times, twice down stream and twice up stream."
>
> (Rec. p. 163, Fol. 238).

He explained exactly what was done and how the work was checked and he likewise had the benefit of the reconnoissance of 1821 (Rec. 163, Fol. 241), and explained that his party was making an effort to obtain "a general idea of the shape, direction and location of the channel" (Rec. 164), and it was his delineation of the channel from which, with other evidence, oral and documentary, the Commission fixed and established the line.

Much is said about what the Supreme Court of Tennessee and the Circuit Court of Appeals, Sixth Circuit, has found with respect to the location of the line.

Neither court had before it the evidence before the Commission and before neither court was any issue made which entitled either court to locate or try to locate the middle of the river of 1876.

If this Court intended to be bound by what some other court found on materially different evidence,

then there was no use in appointing a Commission, as all the Court had to do was to read what some other court had to say on the subject.

Exceptions of this character and arguments of this sort are frivolous.

Much is said on the proposition that a channel used by boats does not necessarily mean that the boat is in the middle of the channel. Of course, this is true. If exact mathematical accuracy was required it would never be possible to find the middle of a navigable channel of any river. It is not unreasonable to assume that a pilot following the navigable channel of a river keeps reasonably close to the middle of it. Whether he varies a few inches or feet wouldn't affect the broad question incident to locating a boundary line.

Much is said about the Trigg tract not having caved and about how many acres comprised the Trigg plantation, but we have discussed all of this and submit that the Commission reached a correct conclusion on this point.

It is finally said (in the nature of repetition) that the "findings of fact by three courts support defendant's contention." (Brief, p. 92).

We do not agree that the statement is accurate. Not a single court has ever undertaken to find or locate the middle of the navigable channel of the river as it ran just prior to the cut-off.

It is in the light of these exceptions and the propositions advanced in support thereof that the plaintiff insists that the costs should be taxed against the parties in equal proportion, except costs incident to bringing up these exceptions.

Respectfully submitted,

CARUTHERS EWING,
Solicitor for State of Arkansas.

J. S. UTLEY,
Attorney-General of State of Arkansas.

EWING, KING & KING,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 2, Original

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

PROPOSED DECREE.

CARUTHERS EWING,
Counsel for Arkansas.
G. T. FITSHUGH,
Counsel for Tennessee.

FILED DECEMBER 16, 1925.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 2, Original

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

DECREE.

The Court overrules the exceptions of the State of Tennessee to the report of the Boundary Commissioners, C. B. Bailey, Charles A. Barton, and Horace Van Deventer, appointed by interlocutory decree of June 10th, 1918, to run, locate and designate the boundary line between the States of Arkansas and Tennessee along that portion of the Mississippi River affected by the Centennial Cut-Off. The boundary line as established by the Commission is accepted, directed and established by the Court in conformity with the Report of the Boundary Commission, as follows:

"Beginning at the mouth of Old River at..... Station 1
Thence S. 73 W. 3,400′ to..... " 2
Thence west 1,000′ to..... " 3
Thence N. 80 W. 1,400′ to..... " 4
Thence west 2,000′ to..... " 5
Thence S. 80 W. 1,200′ to..... " 6

From station 6 U. S. B. M. Thresher bears S. 74-08 W. 1,195.

Thence from Station 6

N. 58 W. 2,500′ to..... Station 7
N. 47 W. 2,500′ to..... " 8
N. 13 W. 1,200 to..... " 9
N. 16 east 9,300 to..... " 10
N. 1 E. 3,015 to..... " 11
N. 20-20 E. 1,400′ to..... " 12
N. 55-20 E. 5,000′ to..... " 13
N. 60 E. 8,000′ to..... " 14

From Station 14 Levee Mile Post 121-122 bears N. 60-55 W. 861′.

Thence from Station 14

N. 56-30 E. 900′ to..... Station 15
N. 18-15 E. 7,100′ to..... " 16
N. 22-45 E. 1,600′ to..... " 17
N. 29-45 E. 1,200′ to..... " 18
N. 40-45 E. 1,400′ to..... " 19
N. 47-45 E. 1,500′ to..... " 20
N. 57-45 E. 1,800′ to..... " 21
N. 72-45 E. 1,800′ to..... " 22
N. 89-06 E. 3,900′ to..... " 23

From Station 23 Levee Mile Post 117-118 bears N. 57-05 W. 1,541′.

Thence from Station 23

S. 76-30 E. 2,785′ to..... Station 24
S. 41-26 E. 4,751′ to..... " 25
S. 19-26 E. 881′ to..... " 26
South 1,430′ to..... " 27
S. 17 W. 4,000′ to..... " 28

From Station 28 the monument at the N. E. corner of the John Trigg 100-acre tract bears N. 78-30 W. 900 feet.

Thence from Station 28

S. 12 W. 4,000′ to	Station	29	
South 2,000′ to	"	30	
S. 15 E. 4,000′ to	"	31	
S. 40 E. 4,000′ to	"	32	"A"
S. 45 W. 3,400′ to	"	33	"A"

On the right bank of the Mississippi River.

Beginning on the left bank of the Mississippi River at Station 1 thence S. 5 E. 1,270′, from which point U. S. B. M. 57-1 bears S. 60-07 E. 2,606 feet; thence continue on original line S. 5 E. 1,509′ to Station 2.

S. 15 W. 3,000 to	Station	3
S. 37 W. 2,500 to	"	4
S. 42 W. 4,000 to	"	5
S. 37 W. 5,000 to	"	6
S. 32 W. 3,900 to	"	7
S. 25-30 W. 1,000 to	"	8

On the left bank of the river.

A total length of boundary line of 116,641 feet, or 22.09 miles."

The foregoing is here and now made the boundary line between the two States parties hereto and the same shall be treated and fixed as the boundary line in question and the same shall be marked accordingly.

The costs certified by the Commissioners are approved and will accordingly be paid.

All costs, including the costs of printing the Report of the Commissioners, with maps filed with said Report and the compensation to the Commissioners, shall be paid equally by

the parties hereto—that is, each shall pay one-half, except the cost of printing the evidence and Supplemental Report of the Commissioners and exhibits, which will be paid by Tennessee.

It is so finally ordered, adjudged, and decreed by the Court.

Approved.

CARUTHERS EWING,
Attorney for Arkansas.

G. T. FITSHUGH,
Attorney for Tennessee.

[Endorsed:] Supreme Court U. S., October Term, 1925. Term No. 2, original. The State of Arkansas, complainant, *vs.* The State of Tennessee. Proposed decree. Filed Dec. 16, 1925.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 8, Original.

IN EQUITY.

THE STATE OF ARKANSAS, COMPLAINANT,

against

THE STATE OF TENNESSEE, DEFENDANT.

The Demurrer of the State of Tennessee, Defendant Above Named, by Charles T. Cates, Jr., Attorney-General of Said State, to the Bill of Complaint Heretofore Filed in this Court by the State of Arkansas.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the defendant State of Tennessee, by her attorney general, by protestation, not con-

fessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, and demurs to said bill, and for cause of demurrer shows:

I.

The bill is without equity on its face.

II.

The bill merely alleges that some confusion or uncertainty exists in relation to the boundary line between the States at the point named in the bill, and wholly fails to disclose any ground of equitable cognizance.

III.

The bill wholly fails to show that any portion of the lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant.

IV.

Because it is not alleged in the bill that it was filed or was being prosecuted by the authority of the State of Arkansas, or by any authority of law whatsoever, the attorney general of Arkansas

having no authority in law, so far as it is shown by any allegation of the bill, to proceed in this matter of his own motion.

V.

It appears from the face of the bill that the matters therein complained of do not constitute such a controversy, within the meaning of the Constitution of the United States, between the States of Arkansas and Tennessee as gives this court jurisdiction of the case.

Wherefore, and for other good and sufficient causes appearing in said bill, this defendant doth demur thereto, and prays the judgment of this court whether she shall be compelled to make any further or other answer or defense to said bill, or any of the matters therein contained, and prays to be hence dismissed with her reasonable costs in this behalf sustained.

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

I certify that the foregoing demurrer is, in my opinion, well founded in point of law.

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

STATE OF TENNESSEE,
County of Davidson, ss:

I, Ben W. Hooper, Governor of the State of Tennessee, upon my oath do say that the above demurrer is not interposed for delay.

BEN W. HOOPER.

Sworn to and subscribed before me this the 26th day of December, 1911.

[Seal John E. Shelton, Notary Public, Davidson Co., Tenn.]

JOHN E. SHELTON,
Notary Public.

[Endorsed:] Supreme Court U. S. October term, 1911. Term No. 8, Original. The State of Arkansas, complainant, *vs.* The State of Tennessee. Demurrer to bill of complaint. Filed January 9th, 1912.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. ~~8~~ 4, Original.

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

BRIEF IN SUPPORT OF DEMURRER OF THE STATE OF TENNESSEE TO THE BILL OF COMPLAINT.

CHARLES T. CATES, JR.,
Attorney General of Tennessee,
For Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 8, Original.

IN EQUITY.

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

BRIEF IN SUPPORT OF DEMURRER OF THE STATE OF TENNESSEE TO THE BILL OF COMPLAINT.

Statement of the Case.

May it Please Your Honors:

This is a suit upon the equity docket of this court to determine the limits of the estate and jurisdiction between two contiguous proprietors, to wit, the States of Arkansas and Tennessee, without showing, as we submit, a single ground of equity jurisdiction.

The Bill

The bill was filed by, or in the name of, the State of Arkansas against the State of Tennessee, alleging in a general way that there is some uncertainty as to the exact location of a small part of the boundary line between said States, and praying for a commission to ascertain and designate such part of said boundary line, and that the same be established by decree of this court.

Briefly stated, the bill alleges:

1. That prior to 1876 the middle of the Mississippi river was the common boundary between said States.

2. That after the earliest recorded survey of the *locus in quo* had been made in 1823 and Arkansas had been admitted into the Union in 1836 there had been some gradual and imperceptible changes in the location of said boundary line in the neighborhood of Dean's Island, in Arkansas, and Island 37, in Tennessee, as the result of accretions to and erosions on both banks of said river.

3. That by 1876 Dean's Island, by accretions thereto, had become gradually enlarged, to wit, to the extent of several thousands of acres, as indicated by plat exhibited with the bill, and the opposite Tennessee shore had proportionately lost by erosion, and that on the 7th day of March, 1876,

the Mississippi river suddenly cut itself a new channel to the south and east of its old channel around Island 37, so that such channel and the one between Island 37 and Dean's Island were in a short time filled up and became dry land, growing valuable timber as well as being suitable for cultivation.

4. That this avulsion did not change the boundary line between the States and *that the same has never been traced* in the old, but now dry, bed of the Mississippi river, and that with the lapse of time the difficulty of actually locating said line is increased.

5. That the State of Tennessee claims the boundary line between said States to be a line equidistant from the visible, defined, and substantially established banks within which the waters of said river flowed in 1823, without regard to the alleged gradual changes made by accretions and erosions whereby, as it is also alleged, "each of said States lost and gained much territory."

6. That in December, 1903, the State of Tennessee brought suit in the Chancery Court of Tipton county, Tennessee, against one W. A. Cissna "to *recover possession* of a considerable tract of land" claimed by said Cissna as accretions to Dean's Island and lying, as claimed by him, on the Arkansas side of the middle of the main channel

of the Mississippi river as it run in 1876; and these matters having been pleaded by Cissna in defense of said action, upon the issues thus made and proof taken in support thereof, the suit was heard and dismissed by the Chancery Court, but upon appeal to the Supreme Court of the State it was, by that court, held that the boundary between the States of Tennessee and Arkansas is a line equidistant between the defined banks of the Mississippi river as it run in 1823, and thereupon the decree of the lower court was reversed by the Supreme Court, and the cause remanded to the lower court, as alleged, "to enable the complainant in that action, the State of Tennessee, to amend its complaint so as to claim title to that point and prosecute the cause in accordance with the opinion of the court reported in the official opinions of the State, 119 Tennessee, p. 47."

7. That said decision by the Supreme Court of Tennessee, the making of said amendment, and the pendency and further prosecution of said suit, make it necessary that the State of Arkansas institute this suit to have determined the true limit of the rightful jurisdiction of each State.

The Demurrer.

To this bill the defendant State of Tennessee demurred upon the following grounds:

1. The bill is without equity on its face.

2. The bill merely alleges that some controversy or uncertainty exists in relation to the boundary line between the States at the point named in the bill, and wholly fails to disclose any ground of equitable cognizance.

3. The bill wholly fails to show that any portion of the lands, in respect of which the relief of establishing their boundary is sought, is in the possession of the defendant.

4. It does not appear upon the face of the bill that it was filed by the authority of the State of Arkansas.

5. That the matters complained of in said bill do not constitute such a "controversy" between the States of Arkansas and Tennessee as gives this court jurisdiction of the case.

BRIEF AND ARGUMENT.

It is not our purpose to challenge the jurisdiction of this court to hear and determine, *in an appropriate case,* a controversy between two States growing out of a disputed boundary, but to respectfully insist:

1. That a bill in equity to determine a disputed boundary does not lie merely upon the ground that some confusion or uncertainty exists in relation to such boundary line without disclosing some ground of equitable cognizance; or, to state the proposition somewhat differently, the mere fact that certain boundaries are in controversy does not, of itself, authorize the interference of a court of equity.

2. This court will not grant the relief sought by the State of Arkansas because the bill shows that she is already in possession of the land claimed by her.

3. That the bill fails to disclose such a controversy, within the meaning of the Federal Constitution, between the two States, as gives this court jurisdiction of the case.

In discussing these propositions we will endeavor to ascertain:

I.

The grounds upon which a court of equity will take jurisdiction of a case to determine a question of boundary between two States.

We respectfully submit that the jurisdiction of this court as a court of equity will not be exercised differently in a case of disputed boundary between two States than if the boundary in dispute was one between two contiguous proprietors of separate tracts of land.

This court has jurisdiction, *in an appropriate case,* of a suit involving the settlement of a disputed boundary between two States, but there is a marked difference between the power and jurisdiction of this court over a controversy between two States growing out of the question of disputed boundary and the jurisdiction of this court sitting as a court of equity to hear and determine such controversy.

This court, we respectfully insist, sitting as a court of equity, has jurisdiction of a case brought to determine a disputed boundary only when some well recognized ground of equitable cognizance is disclosed by the bill. In other words, this court of equity will determine a question of boundary when it has jurisdiction of the case upon some well recognized ground of equitable jurisdiction—not because the *dispute over the boundary* or some uncertainty or controversy in reference thereto, *per se,* gives this court jurisdiction, but for the reason

that when it takes jurisdiction of the case upon some ground of equitable relief, such as fraud, multiplicity of suits, or some equity superinduced by the act of the parties, it will, as incidental to such jurisdiction, determine a disputed or controverted boundary.

This proposition is sustained by the decisions of this court, of the high court of chancery, and of the supreme courts of practically all of the States preserving the distinction between courts of law and equity, as well as the opinions of most eminent text writers dealing with the question.

In *Rhode Island vs. Massachusetts,* 12 Peters, 654-732, this court, in relation to the bill in that case, said:

> "The first prayer is to ascertain and establish a boundary. Having expressed our opinion that the subject of boundary is within our jurisdiction we must exercise it to some extent, and on matter connected with or dependent upon it, *and as the bill is on the equity side of the court it must be done according to the principles and usages of a court of equity.*"

And, further, on page 734, this court said:

> "*No court acts differently in deciding on boundary between States than on lines between separate tracts of land.*"

No conflicts of jurisdiction exist or are threatened.

As we understand it, the principal ground of equitable cognizance upon which this court sustained the bill in Rhode Island *vs.* Massachusetts was the fraud and bad faith charged by the complainant against the defendant in securing the compact or agreement under which the defendant, Massachusetts, obtained and remained in possession of the disputed territory.

This "question of fraudulent representation in obtaining certain action of Rhode Island" is referred to, in the language quoted, in *Virginia vs. West Virginia,* 11 Wall., 39, another boundary line case in this court, in which the pleadings contained charges of fraud and called for the construction of acts and agreements between two States and an act of Congress.

Whenever the question has been raised in this court, as we understand its opinions, there has been found some distinct ground of equity jurisdiction invoked by the pleadings.

We do not understand that the court in any case has gone to the extent of holding that a disputed boundary between two States *per se,* gives this court of equity jurisdiction of the case.

In the cases of *Iowa vs. Illinois,* 147 U. S., 1; *Nebraska vs. Iowa,* 145 U. S., 359; *Missouri vs. Iowa,* 165 U. S., 118; *Indiana vs. Kentucky,* 167 U. S., 270—these cases are reported also in earlier volumes—the questions made on this demurrer, that is, that in addition to there being a mere con-

fusion of boundaries, there must be some other ground of equitable cognizance—were not made, as we understand the opinion, and the proceedings were largely by consent.

In fact, the only ground suggested in the bill for invoking the interposition of this court of equity is that there may be some uncertainty, or that there is some controversy, as to the true boundary between the States at or near Dean's Island and Island 37, and that the boundary line at this place along the old, and now dry, bed of the Mississippi river has never been run and marked, and that by the lapse of time it is becoming more difficult to ascertain just where the true boundary line is at this place.

In stating that the bill alleges some *uncertainty* as to the boundary we are perhaps giving greater strength to the allegations of the bill than they are entitled to, because, as a matter of fact, the bill does not expressly aver that there is any uncertainty or confusion as to the boundary line between the States, but after alleging that there had been some gradual shifting of the boundary line between the States prior to 1876, and that the avulsion occurring in March of that year, by which the river cut for itself a new channel, fixed the boundary line at the place where it was immediately prior to the avulsion, the bill merely alleges that "*said line has never been traced or run,* and with the lapse of time the difficulty of accurately

locating and running said line is increased, wherefore it is important to the affected States that the same be now run."

Printed bill, p. 7.

This statement that the line has not been traced and whatever of uncertainty may be implied therein and the allegation that the State of Tennessee insists that the boundary line between the States is a line equidistant from the visible, defined, and substantially established banks within which the water flowed in the year 1823, which claim the State of Arkansas does not expressly controvert, and could not, as we shall hereinafter show, constitute the sole grounds upon which the jurisdiction of this court of equity is invoked.

We repeat that mere uncertainty as to the boundary or a controversy in respect of its location is not, *per se,* sufficient to warrant the interposition of a court of equity.

In *Wake vs. Conyers,* 1 Eden, 331, a bill had been filed to have ascertained and settled the boundaries between two manors—Waltham and Epping—and the defendant had submitted to the jurisdiction of the court, but the question of the court's jurisdiction was raised by Lord Keeper Henley, afterwards Lord Chancellor and Earl of Northington, who, after hearing argument upon the question, held that a court of chancery "has no power to fix the boundaries of legal estates, unless

some equity is superinduced by the act of the parties, as some particular circumstance of fraud, etc."

"In order to give the court jurisdiction there must be some equitable circumstance in the case."

In *St. Luke's vs. St. Leonard's,* 2 Anst., 395, Lord Thurlow refused to grant a commission to ascertain and fix the boundary between two parishes, in the absence of equitable circumstances.

Both Lord Northington and Lord Thurlow seem to have been of the opinion that the jurisdiction of the chancery court to grant commissions to ascertain boundaries was originally exercised *by consent of the parties,* and that the next step probably was to grant the commission on the application of the party showing an *equitable* ground for obtaining it.

In *Speer vs. Crawter,* 2 Meriv., 418, Sir William Grant, master of the rolls, said:

> "In the case of *Wake vs. Conyers,* Lord Northington says that in his apprehension this court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by the act of the parties. I concur in that opinion and think that the existence of a confusion of boundaries furnishes, *per se,* no ground for the interposition of the court."

In *Marquis of Bute vs. The Gamorganshire Canal Co.,* 1 Ph., 681, it was objected that it was only a dispute between two contiguous proprietors as to their actual boundaries, and that the remedy was at law, but jurisdiction was sustained to prevent a *multiplicity of suits,* and on account of equities growing out of the acts of the defendant. However, in this case the Lord Chancellor approved the doctrine of Wake *vs.* Conyers, *supra,* and said:

> "The rule as I apprehend is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for commission; there must be some equity arising out of the conduct or acts of the parties against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of suits."

The doctrine of these cases is recognized by such eminent jurists and text-writers as Judge Story and Professor Pomeroy, Mr. Adams and Mr. Bispham.

Judge Story, in his great work on Equity Jurisprudence, vol. I, sec. 615, lays down the rule as follows:

> "But, whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by courts of equity of late years; and there seems no inclination to favor it, unless special grounds are laid to sustain it.

> The general rule now adopted is, not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground, that the boundaries are in controversy; but to require that there *should be some equity superinduced by the act of the parties;* such as some particular circumstances of fraud; or some confusion, where one person has ploughed too near another; or some gross negligence, omission, or misconduct, on the part of persons whose special duty it is to preserve or perpetuate the boundaries."

And further:

> SEC. 619. "These cases (referring to the English chancery cases) are sufficient to show, that the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of courts of equity, to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law. It is, therefore, necessary to maintain such a bill (as has been already stated), that some peculiar equity should be superinduced. In other words, there must be some equitable ground attaching itself to the controversy. And we may, therefore, inquire, what will constitute such a ground? This has been in part already suggested. In the first place, it may be stated, that if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the court. And if the fraud is established, the court will by commission ascertain the boundaries, if practicable; and if not practicable, will do justice between the parties

by assigning reasonable boundaries, or setting out lands of equal value."

SEC. 620. "In the next place, it will be a sufficient ground for the exercise of jurisdiction, that there is a relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries; and that by his negligence or misconduct, the confusion of boundaries has arisen. Thus, if, through the default of a tenant, or a copyholder (who is under an implied obligation to preserve them), there arises a confusion of boundaries, the court will interfere, as against such tenant or copyholder, to ascertain and fix the boundaries. But, even in such cases, it is further indispensable to aver, and to establish by suitable proof, that the boundaries, without such assistance, cannot be found. And the relation of the parties, entitling them to the redress, must also be clearly stated; for where the parties claim by adverse titles, without any superinduced equity, we have already seen, that the remedy is purely at law."

SEC. 621. "In the next place, a bill in equity will lie to ascertain and fix boundaries, when it will prevent a multiplicity of suits. This is an old head of equity jurisdiction; and it has been very properly applied to cases of boundaries."

In Pomeroy's Equity Jurisprudence, vol. 3, sec. 1379, we find:

"The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has

almost displaced the legal remedies, *that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.*"

And at section 1384 Professor Pomeroy says:

"Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them. Whether this jurisdiction originated in the consent of the parties and proceeded by analogy to the writs *de rationalibus divisis,* and *de perambulatione facienda,* used at law, or arose in avoidance of a multiplicity of suits, has been discussed; but the determination of the question remains uncertain and conjectural. *The mere fact, however, that certain boundaries are in controversy is not, of itself, sufficient to authorize the interference of equity;* and upon such a showing the parties would be left to their rights and remedies at law. *Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties.*"

In his Principles of Equity, p. 547, Mr. Bispham says:

"The general rule may now be stated to be that a court of equity has no jurisdiction to fix the boundaries of legal estates unless

some equity is superinduced by the act of the parties (*Hicks vs. Hastings,* 3 K. & J., 701), or unless some particular circumstance of fraud or confusion exists (*Wake vs. Conyers,* 1 Eden, 331; *Wolfe vs. Scarborough,* 2 Ohio St., 361). Thus, where the owner of land broke down the dam and plowed up the raceway which led from it, so as to render it difficult for the complainant, who was entitled to use both the dam and the raceway, to ascertain and define their course and situation, it was held that relief was properly sought for the chancery (*Merriman vs. Russell,* 2 Jon. Eq., 470). And where the settlement of a boundary was necessary, under the circumstances of the case, to prevent a multiplicity of suits, the jurisdiction was sustained (*De Veney vs. Gallagher,* 5 C. E. Green, 33; *Bute (Marquis) vs. Glamorganshire Canal Co.,* 1 Phillips, 681; *Bouverie vs. Prentice,* 1 Bro. C. C., 200; *Mayor of York vs. Pilkington,* 1 Atk., 282). But a mere confusion of boundaries, without more, will not be enough to sustain a bill (see *Norris' Appeal,* 14 P. F. Sm., 275; *Tilmes vs. Marsh,* 17 *Id.,* 507; *Haskell vs. Allen,* 23 Maine, 448; *Doggett vs. Hart,* 5 Florida, 215, 232; *Wolcott vs. Robbins,* 26 Conn., 236; *Dickerson vs. Stoll,* 4 Hals., 294; *Topp vs. Williams,* 7 Humph., 569). And the circumstance that the plaintiff has only an equitable title, and that the legal title is outstanding in the hands of trustees, will not be enough to give jurisdiction (*Stuart's Heirs vs. Coalter,* 4 Rand., 74; *Doggett vs. Hart,* 5 Florida, 215."

In his Doctrine of Equity (side page 237) Mr. Adams says:

> "The equity for ascertainment of boundary arises when lands are held in severalty by independent proprietors, *but the boundaries have been confused by the misconduct of the defendant, or of those under whom he claims* (see Mayor, &c., of Basingstoke *vs.* Lord Bolton, 1 Drew., 170). The mere confusion of boundary will not create it, for the fact that a man cannot ascertain his property does not constitute an equity against another person. But it must be shown that the confusion has been caused by the defendant's misconduct, or by the misconduct of those under whom he claims. As, for example, where a tenant has confounded the boundaries to prevent a distress, or a copyholder has confounded the copyholds with his own freehold. In this case the court will issue a commission to ascertain the boundaries, or will set out an equivalent portion of the lands in the defendant's possession. It will, at the same time, if necessary, decree an account of rents and profits (Wake *vs.* Conyers, 1 Eden, 331; Speer *vs.* Crawter, 2 Merv., 410; Miller *vs.* Warmington, 1 J. & W., 464)."

An examination of the cases cited will show that it is not a mere controversy or confusion in respect of a boundary that gives a court of equity jurisdiction to entertain a bill to ascertain and settle such boundary, but when the jurisdiction of a court of equity is invoked upon the ground that the boundaries between two independent proprietors have

become *confused,* it must be shown that the *confusion* or uncertainty as *to the location of the boundary grows out of some act of the defendant or those under whom he claims*—that is, "some equity superinduced by the act of the parties."

The doctrine of *Wake vs. Conyers, supra,* and the principles laid down and approved by Judge Story, Professor Pomeroy, Mr. Adams and Mr. Bispham have been followed in the decisions of practically all of the different States wherein the distinction between courts of equity and law has been preserved, and are to the effect that a court of equity will not intervene to fix the boundary between two adjacent tracts, although the line has become doubtful or controverted through the loss or obliteration of the landmarks by which it was defined, unless some equity has been superinduced by the neglect or misconduct of the defendant or of those under whom he claims, or to prevent a multiplicity of suits.

We shall quote briefly from some of them.

In *Perry vs. Pratt,* 31 Conn., 433, the facts involved were quite similar to those in the case at the bar—practically the only difference being that the stream (referred to in Perry *vs.* Pratt) which changed its bed was a *creek* instead of the Mississippi *river.*

In said case the plaintiff's and defendant's farms were divided by a creek which crossed the beach and emptied into Long Island Sound, and

it appeared that the bed of the stream had been changed by a violent storm, extraordinary tides and other natural causes, that the boundary was lost and could not be fixed or ascertained in the course of legal proceedings (p. 435). The complainant, therefore, prayed the court to appoint commissioners to inquire into the facts and settle the controversy. The court, in discussing the jurisdiction of a court of equity to grant the relief sought (p. 440), said:

> "It is, therefore, confined to cases where there is some peculiarity attached to the controversy respecting the lost lines, arising out of the fraudulent or negligent misconduct of the respondent; where it is his duty to preserve the boundaries and they cannot otherwise be found or restored; to cases where resort to equity is necessary to prevent a multiplicity of suits; and to cases where the power is necessarily exercised incidentally in furtherance of another equity. Controversies not presenting any peculiar equity, like the one in question, have been left to be settled by proceedings at law."

However, in this case the court granted the relief under the authority of an act of the legislature which provided that in case of a lost, obscure, or uncertain boundary a court of equity might appoint a commission to inquire into the facts, establish the bounds, and report to the court on the want of an adequate remedy at law.

In *Wolfe vs. Scarborough,* 2 Ohio St., 362–368, Judge Thurman said:

> "This depends upon whether he has made a case by his bill and proofs for cognizance of a court of equity. The bare fact that a line is in controversy does not entitle a party to resort to this forum. There must, in addition, be something in the nature of his title, or in the circumstances of the case, that brings it under an acknowledged head of equity jurisdiction, as, for instance, the want of an adequate remedy at law, or the fraudulent suppression of evidence by his adversary or a necessity for resorting to equity to avoid a multiplicity of suits. 1 Story Eq., secs. 619 to 622, inclusive."

In *Ashurst vs. McKenzie,* 92 Ala., 484-487-8, Judge McClellan, speaking for the Supreme Court of Alabama, said:

> "The jurisdiction of chancery to establish disputed boundaries is ancient and well defined. *It does not arise upon any mere dispute as to the location of the boundary between adjacent parcels of land, or even upon a mere dispute as to such location of a confused or obliterated line.* There must in addition to all this be some special ground of equitable interposition. Such grounds, it is said, may be predicated on the fraud or neglect of duty of the defendant whereby the confusion and obliteration has resulted, and where the line is marked upon the surface of the ground, and is plowed over and obliterated for the purpose of a fraudulent insistence that it is elsewhere than at its

> true location; or by a person having at the time possession of his own and the adjoining parcel, and thus being under a duty of maintaining and preserving the demarkation of the two tracts. 3 Pom. Eq. Jur., 1384-5; Wake *vs.* Conyers, 1 Eden Ch., 227; Rous *vs.* Baker, 4 Town P. C., 660; Speer *vs.* Crawter, 2 Merio, 410–17; Norris' Appeal, 64 Pa. St., 275; Hill *vs.* Proctor, 10 W. Va., 59; Wetherber *vs.* Dunne, 36 Cal., 249."

Another strong opinion upon this same question from the Supreme Court of Alabama is Guice *vs.* Barr, 130 Ala., 570–573.

In *Nye vs. Hawkins*, 65 Tex., 600–603, the Supreme Court of Texas said:

> "That courts of equity from early times, under certain circumstances, have exercised such a jurisdiction is true, *but no case is found in which this power was exercised on the sole ground that a boundary was in controversy.* 'The general rule now adopted is, not to entertain jurisdiction in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties, such as some particular circumstance of fraud, or some confusion where one person had plowed too near another, or some gross negligence, omission or misconduct on the part of the person whose special duty it is to preserve or perpetuate the boundaries.' Story's Eq., 615; Pomeroy's Eq., 1384-1385; Adams' Eq., 237; Tyler on Bound., 256-280; 2 Leading Cases in Eq., 680."

In Humboldt County *vs.* Lander County, 22 Nev., 248-257-8, the Supreme Court of Nevada, speaking through Chief Justice Murphy, said:

> "Whatever it may have been, it is certain that at the present day the mere existence of a disputed boundary, even though lost or confused, is insufficient to give a court of equity jurisdiction. In addition, there must be equitable circumstances shown, which has arisen from the conduct, situation, or relations of the parties; such as that the boundary has become confused through the fraud of the defendant, or that the duty of preserving it rests upon him, or that it will avoid a multiplicity of suits. In *Speer vs. Crawter, supra,* Sir William Grant, M. R., stated the law as follows: 'But on what principle can a court of equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided?' In some cases, certainly, the court has granted commissions or directed issues on no other apparent ground than that the boundaries of manors were in controversy. In Wake *vs.* Conyers, 2 Cox, 360, however, Lord Northington held that it was in the case of manors that the exercise of the jurisdiction, which, he says, 'had been assumed of late,' was peculiarly objectionable. He refused either to grant a commission or to direct an issue. So did Lord Thurlow in the case of two parishes (St. Luke's *vs.* St. Leonard's, 2 Anstr., 386, 395). In the same case of Wake *vs.* Con-

yers, Lord Northington says that, in his apprehension, this court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes *per se* no ground for the interposition of the court."

In *Collins vs. Sutton,* 94 Va., 127-8, the Supreme Court of Virginia, among other things, said:

"The chief object of the bill in this case is to settle a disputed boundary line. It does not appear that the bill was demurred to, but the objection for want of jurisdiction may be taken for the first time in this court. See *Boston Blower Co. vs. Carman Lumber Co.,* ante, p. 94.

"The bill alleges that the boundary line between appellee and appellants is in dispute, and prays that such proper proceedings may be had and decrees entered as will establish the true boundary line between them.

"The mere fact that the boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless in addition to the naked confusion of the controverted boundaries there is suggested some peculiar equity, which has arisen from the conduct, situation, or relation of the parties. 3 Pom. Equity Jur., sec. 1384; Stuart's Heirs *vs.* Coalter, 4 Rand., 74; Lange *vs.* Jones, 5 Leigh, 192."

In Hough *vs.* Martin, 22 N. C., 379, the Supreme Court of North Carolina, speaking through Chief Justice Ruffin, said:

> "For this reason, the bill cannot assume the aspect of one for ascertaining confused boundaries; for although the court of equity has exercised the jurisdiction of settling boundaries of legal estates, yet it has been cautiously exercised, and in only a few instances, and in none in which the boundaries were not once certain, *and had been rendered uncertain by the default of the defendant, or those under whom he claimed.* In the case before us the gravamen is not that a single landmark had been altered, or been permitted to perish *by the act or neglect of the other parties;* but that the testator was inexplicit and obscure in the language of his will.
>
> "If, however, that objection did not exist, the present case is not within the principles upon which the jurisdiction of ascertaining boundaries has hitherto proceeded. In all the cases there was either an agreement that the land of the several parties should be distinguished, as in *Norris vs. Le Neve,* 3 Atk., 31; or some relation between the parties, which made it the duty of one of them to preserve the landmarks, and therefore the boundaries became confused by the neglect or fraud of the party charged with that duty—as a tenant: *The Duke of Leeds vs. The Earl of Strafford,* 4 Ves., 180; *Attorney-General vs. Fullerton,* 2 Ves. & Bea., 264; *Willis, vs. Parkinson,* 1 Swanst., 9. It is not enough that the boundary is controverted, or that it has become con-

fused, although it was once plain; but the confusion must have arisen from the misconduct of the defendant, who is therefore equitably obliged to aid in its re-establishment: *Miller vs. Warmington,* 1 Jac. & W., 492. Between independent proprietors, equity does not interpose, where there is no agreement, fraud, or neglect, and require either of them, against his will, to have his legal rights determined in any but the established legal method: *Atkins vs. Hatton,* 2 Anst., 386; *Speer vs. Crawter,* 2 Meriv., 417."

To the same effect are:

Walker *vs.* Leslie, 90 Ky., 642.

Doggett *vs.* Hart, 5 Fl., 215.

Pendry *vs.* Wright, 20 Fl., 828.

Bresler *vs.* Pitts, 58 Mich., 347.

Haskell *vs.* Allen, 23 Me., 448.

Dickerson *vs.* Stoll, 8 N. J. Eq., 237.

Merriman *vs.* Russell, 55 N. C., 470.

Tillmes *vs.* Marsh, 67 Pa. St., 507.

Aborn *vs.* Smith, 11 R. I., 594.

Topp *vs.* Williams, 7 Humphr. (Tenn.), 569.

Hale *vs.* Darter, 5 Humphr. (Tenn.), 78.

Watson *vs.* Ferrell, 34 W. Va., 406; 12 S. E., 724.

Cresap *vs.* Kemble, 26 W. Va., 603.

Hill *vs.* Proctor, 10 W. Va., 59.

Wilson *vs.* Hart, 90 Mo., 618.

II.

But—

This Court will not grant the relief sought because complainant is in possession of the premises.

The bill shows that the lands claimed by the complainant are either in her own possession or that of W. A. Cissna claiming under her, and that so far from defendant being in possession thereof, she is prosecuting in an orderly way an action (Printed Bill, p. 8) to recover the same.

We respectfully insist that it is the settled rule of courts of equity, even where facts are averred which otherwise would authorize the interference of equity to establish a disputed boundary, to refuse relief when the complainant is in possession of the premises.

In *Attorney-General vs. Stevens,* 6 De. G. Mac. & G., 111 & 149 (overruling the Vice-Chancellor, 1 K. & J., 724), and *Godfrey vs. Little,* 1 Russ. & My., 59; 2 Russ. & My., 630. it was held that in addition to the grounds of equitable relief, in order to sustain a bill for a commission to ascertain boundaries, the plaintiff must show that some portion of the lands, the boundaries of which are alleged to have been confused, *is in the possession of the defendant.*

Professor Pomeroy (Equity Jurisprudence, vol. 4, sec. 1385) says:

> "It is necessary for the complainant to show that some portion of the lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant."

Mr. Bispham (p. 547) says, that to sustain the bill the plaintiff must show that some portion of the land is in the possession of the defendant.

In Ashurst *vs.* McKenzie, 92 Alabama, 484, 489, 490, the Supreme Court of Alabama, speaking through McClelland, J., said:

> "Moreover, had the facts alleged and which complainants' evidence went to establish been otherwise of a character to invoke equity interposition to the establishment of disputed and confused boundaries, the bill to that end is fatally defective in that it shows that the complainants were in possession of all the land they set up any claim to. The relief by way of establishing a boundary, or, that being impossible, allotting to complainants a sufficiency of land out of the two tracts—they being considered in the nature of a common fund for this purpose—to make up the full acreage of the parcel to which they are entitled, manifestly cannot be worked out against a defendant who is in possession of no part of the land claimed by complainants and who therefore has nothing which could be taken away from him, either by delineation of the true boundary, or by an allotment to complainants of an area equal to that embraced in their parcel as originally bounded. 3 Pom. Eq. Jur., sec. 1385; Att'y Gen. *vs.* Stephens, 6

> De. G. M. & G., 111; Godfrey *vs.* Littel, 2 Rus. & My., 630. The bill, therefore, cannot be maintained for the purpose of determining to whom the land in controversy belonged."

To the same effect is

Wilson *vs.* Hart, 98 Mo., 618.

The settled form of decree in suits in equity to determine boundaries, where relief is granted in an appropriate case, directs defendant to deliver possession of the lands to complainant.

As stated by Mr. Daniel (2d Ch. Pl. and Pr., 1164):

> "The decree, in a suit to settle boundaries, does not order mutual conveyances, as in the case of a partition; but directs that, after the lands have been set out, *the defendant is to deliver possession thereof to the plaintiff*, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him."

In Rhode Island *vs.* Massachusetts, 12 Peters, 654-732-735, it appears that the particular land, which was the subject of the controversy, was in the possession of the State of Massachusetts.

In Missouri *vs.* Iowa, 17 How., 660, the bill charged that the defendant, Iowa, was in possession of the disputed territory, some two hundred miles long and ten miles wide.

In United States *vs.* Texas, 143 U. S., 621-640, Greer County claimed by the United States, was in possession of the State of Texas.

In Virginia *vs.* West Virginia, 11 Wallace, 39, the counties of Berkley, Jefferson, and Frederick, claimed by Virginia, were in the possession of West Virginia, according to the allegations of the bill.

In Virginia *vs.* Tennessee, 148 U. S., 501, the territory nearly one hundred miles long and several miles wide, was shown by the bill to be in the possession of the defendant, State of Tennessee.

As we understand the facts involved in other cases in which this court has exercised jurisdiction to determine disputed boundaries, it appeared therein that some portion of the territory in dispute was in the possession of the defendant.

III.

Does the bill show a controversy, within the meaning of the Constitution, between the States of Tennessee and Arkansas?

Tennessee contends that no such controversy is shown.

What is meant by a controversy between two States within the meaning of that clause of the Constitution conferring original jurisdiction upon this court over "controversies between two or more States" has not found expression in the form of a

controlling definition in the decisions of this court, but (Wisconsin *vs.* Insurance Co., 127 U. S., 297) must be determined upon the merits and facts of each case.

However, an examination into the origin and history of this clause and a consideration of the cases in which it has been applied shows clearly, we submit, that something more than a mere "case" or "cause of action" in its ordinary technical signification was meant by the term "controversies," and that the jurisdiction of this court against a sovereign State should only be invoked upon the gravest considerations and after other methods for the solution of differences, obtaining between friendly States, has failed.

In writing the clause under consideration into the Federal compact designed "to form a more perfect Union, to establish justice and insure domestic tranquillity" it was the intention of its framers to substitute, for the field of battle and the clash of arms, the orderly processes, the calm investigation and impartial judgment of this Supreme Court of the Union, as the final—the *dernier*—resort and sole arbiter for the settlement of those questions of sovereignty, in respect of which the States, after exhausting other efforts to reach an agreement, might find themselves in direct conflict.

As was in effect said by this court in Louisiana *vs.* Texas, 176 U. S., 1, 15, its jurisdiction in respect of controversies between the States of this Union

is of so delicate and grave a character that it was not contemplated that it would be exercised, even in a matter properly justifiable, save when the necessity therefor is absolute; and that (p. 16) in order to maintain jurisdiction of a bill by one State against another it must appear that the controversy to be determined is one arising directly between the States, and not one in vindication of grievances of particular individuals; and that (p. 18) there must be a direct issue between the States, but as Chief Justice Fuller pertinently observed:

> *"It is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made."*

Therefore, while admitting that a matter of disputed boundary between two States may be justiciable in this court, nevertheless, we respectfully submit that its jurisdiction in respect thereof will not be exercised unless it be made to appear—

a. That there is a direct issue between the States in regard to their respective boundaries; and

b. That the States have failed in proper efforts to agree about the matter; so

c. That an appeal to this court for the exercise of its supreme jurisdiction is absolutely necessary to determine the question.

And as corollary to the proposition that the conflict or controversy must be shown to be between two States, that it must not appear to be one

sought to be prosecuted to vindicate the supposed grievances of particular individuals.

Now, applying these tests, sanctioned by this court in Louisiana *vs.* Texas, *supra,* to the case at bar, we ask—

What direct issue is shown by the bill to exist between the States?

An issue in the very nature of things implies the pre-existence of differences and negotiations in respect thereof which have brought the parties to a point demanding a decision; and, as stated by Chief Justice Fuller *supra* it being difficult "to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made," it will be helpful in determining whether such an issue exists between the plaintiff and defendant to inquire into and ascertain what efforts, if any, have been made by Arkansas toward an accommodation of differences, and what differences, with the State of Tennessee.

An examination of the bill will show that it does not even suggest that plaintiff had made any effort whatsoever at the accommodation of any difference between herself and the defendant.

The bill utterly fails to disclose any difference between the States—and cause of complaint—which had merited the notice of either the executive or legislative department of Arkansas.

The bill contains no suggestion even that the defendant had taken possession of any territory

claimed by plaintiff to belong to her—and no clash of conflicting jurisdiction is averred.

For aught that appears in the bill to the contrary, its presentation to and filing in this court was the first notice of any claim of any kind by the plaintiff against the defendant.

It is to be noted that the bill is not signed by the Governor of Arkansas, and shows no act of her legislature authorizing it—in fact, it does not purport to have the sanction of either the executive or legislative department of Arkansas.

The utter silence of the bill in respect of these pertinent, if not essential, matters can have but one meaning—that is, that there has been no *controversy,* no issue, between these States; and we respectfully submit that in no such case as the one at bar has the grave and delicate jurisdiction of this court been hitherto invoked against a State.

While the bill contains no intimation even of any difference between the States, previous to its filing, this court, having cognizance of the decisions of other Federal courts, judicially knows that in a suit between a citizen of defendant, one Stockley, and W. A. Cissna, a citizen of plaintiff, begun in the Circuit Court of the United States for the Western District of Tennessee, in regard to a part of this same *locus in quo* and carried by appeal to the Circuit Court of Appeals for the Sixth Circuit of the United States, it was by that court, in a luminous opinion by Judge Lurton, held that said *locus in quo* is on the Tennessee side

of the old channel of the Mississippi river and, therefore, within the boundary of Tennessee.

Stockley *vs.* Cissna, 119 Fed. Rep., 812, 823, 831 to 838.

In said case the plaintiff Stockley, claiming the lands in the old bed of the river as accretions to certain riparian tracts owned by him and also by virtue of a grant from the State of Tennessee after the old bed of the river had become dry land, sued Cissna in ejectment, and while it would seem that the defendant Cissna claimed the premises in dispute as accretions to Dean's Island (119 Fed., 828), and had filed a plea in abatement to the jurisdiction of the court on the ground that the land was in Arkansas, such plea was withdrawn (119 Fed. Rep., 823), and at the trial he relied upon his plea of "not guilty" (119 Fed., 814), which compelled plaintiff to show a perfect title in himself and permitted defendant to show an outstanding title in another.

Upon the issues thus made in Stockley *vs.* Cissna, *supra,* the Circuit Court of Appeals, among other things, in effect held:

1. That the *locus in quo* was on the eastern or Tennessee side of the middle line of the old channel of the Mississippi river and within the boundary of the State of Tennessee.

2. That under the laws of Tennessee the bed of a navigable stream below low-water mark belongs to the State, and where, as a result of an avulsion, the channel of a stream is changed and the old bed emerges from the water it is the property of the State to the extent of the original lines between low-water mark and the center of the channel or bed, where such lines can be identified.

It is to be noted that the earliest record of said lines consists of surveys made under the authority of the United States in Arkansas, and grants under the authority of the State of Tennessee—all about 1823—as shown by Humphreys' map, made a part of the statement of the case by the court, as shown on pages 816 and 818, volume 119, Federal Reports.

3. That such lands were not subject to grant within the meaning of the laws of Tennessee authorizing the issuance of grants for unappropriated or vacant lands; but

4. That the old bed of the river from the restored low-water mark to the center of the old channel was public property held by the State for public uses.

This being an action of ejectment, and plaintiff failing to show title in himself, the technical decision was in favor of Cissna, but, as we submit, *upon the ground that the title to the property sued for by Stockley was in the State of Tennessee.*

This decision by the Court of Appeals was made in 1902, and while from its importance as affecting such a matter of great public interest as the boundary line between the States it must have become known at once to the authorities of Arkansas, nevertheless she made no denial of its justness nor set up any claim in contravention thereof.

One of the results of this decision, as this court can see, being to call to the attention of the State of Tennessee that the land involved therein was a part of her public domain and had been taken possession of by Cissna, the suit referred to in the eighth paragraph of the bill was brought by her in 1903 against Cissna to recover possession of said land, claimed by him as accretions to Dean's Island, of which the bill in this case alleges he also claims to be the owner.

Upon the issues made in said case instituted in 1903, as aforesaid, and the proof taken in support thereof, the lower court held with Cissna, but the Supreme Court of the State, in September, 1907, approving the principles laid down by the United States Circuit Court of Appeals in Stockley *vs.* Cissna, *supra,* in an exhaustive opinion rendered by Mr. Justice Shields, reversed the judgment of the lower court and remanded the cause for further proceedings in accordance with its opinion. The opinion of the Supreme Court of Tennessee, as officially reported in 119 Tenn., 47, is referred to and in effect made a part of the bill.

But said opinion and decision of the Supreme Court of Tennessee is the law of that State, and, even if it had not been in effect pleaded in this cause, this court will take cognizance of it as a law of the State.

In *Pennington vs. Gibson,* 16 Howard, 66-81, it is said that this court "can and should take notice of the laws and judicial decisions of the laws of the several States of this Union."

In *Lamar vs. Micou,* 114 U. S., 218, 223, this court said that it will take judicial notice of the laws of the various States "whether depending upon statutes or judicial decisions."

See also:

Owings *vs.* Hull, 9 Pet., 707, 625.
Cheever *vs.* Wilson, 9 Wallace, 109.
Mills *vs.* Green, 159 U. S., 651-678.
Allen *vs.* Alleghany Co., 196 U. S., 458-464.

So, whether pleaded or not, this court judicially knows that in the case of the State of Tennessee *vs.* The Muncie Pulp Co. and W. A. Cissna, decided by the Supreme Court of Tennessee in September, 1907, 119 Tenn., 47-134, it was, among other things, in effect held:

1. That the western boundary of the State of Tennessee, declared and fixed by treaty and legislative enactments to be "the middle of the Mississippi river," and the eastern boundary of the State of Arkansas, declared and fixed by treaties

and legislative enactment to be "the middle of the main channel of the Mississippi river" is a line along the middle of the main channel or bed of the river equidistant from the visible defined and substantially established banks within which the waters are confined and flow in their natural and ordinary stages and does not mean the center of that part of the river which, because it is deepest, may constitute the channel of commerce.

2. That the title to the bed of said river between low-water mark on the eastern shore and said middle line was in the State of Tennessee.

3. That the change in the channel of the river in 1876, under the circumstances set out in the opinion, was an avulsion which did not change the boundary line from the old bed to the new channel.

4. That where lands have been submerged or covered by water, as the bed of a stream, and emerged therefrom, they are restored to the former proprietors or owners to the extent of the lines of their property where the same can be identified.

5. That the presumption is in favor of the permanency of boundary lines, and the burden of proof is upon the party averring that the location

of such lines had been changed by the action of the forces of nature.

6. That no accretions are shown to have been made to Dean's Island previous to 1876—the date of the avulsion.

7. That the boundary line between the States of Tennessee and Arkansas at the point in dispute is a line along the old channel, midway between the banks as they existed in 1823, as shown by the Humphreys' map, set out in the opinion of the court as the earliest record of the location of said banks.

These holdings, in so far as they were pertinent, were affirmed in the case of Stockley *vs.* Cissna, decided at the same term (September Term, 1907) and officially reported in 119 Tenn., 135-177. And it is not improper to call to the attention of the court that the facts involved in this case show the utter absurdity of Cissna's claim, because the lands on account of which Stockley was given relief against Cissna were above low-water mark on the Tennessee shore as it existed in 1823, but claimed by Cissna as accretions to Dean's Island in Arkansas.

Was there any dissent by Arkansas from the principles controlling this decision in State *vs.* Muncie Pulp Co. and Cissna, 119 Tenn., 47-134, or

from the location of the boundary line as therein adjudged?

None appears to have been made in any form until the bill in this case was presented to this court, and we submit that the allegations of the bill in respect of the contention now made by plaintiff leave it doubtful whether she controverts either the location of the boundary line between the States at a point equidistant between the well defined and substantially established banks of the Mississippi river, or the principles governing the ownership of submerged lands from which the waters have disappeared as declared in the opinion and judgment of the Supreme Court of Tennessee—the opinion (Polk *vs.* Pledge, 5 Heisk., 373-4) being a part of the judgment of the court.

If the allegations of the bill be given their strongest effect they amount to nothing more than this:

That the banks of the river in 1823 are definitely located by a recorded survey made in that year, but that between 1823, or when Arkansas was admitted into the Union in 1836, and 1876, there had been some changes in the current and imperceptible shiftings in the channel of the Mississippi river causing corresponding shiftings in the boundary line, which, however, became fixed by the avulsion occurring in 1876; and that the defendant, regardless of said alleged shiftings, claims that the line between the States is one equidistant from the

well defined and substantially established banks of the river in 1823.

But whether the alleged "shiftings" of the current or channel had carried the true boundary line between the States to a point other than that declared by the Supreme Court of Tennessee is not charged—certainly not affirmatively charged—and whether plaintiff now contends for a rule of property in respect of submerged lands, such as the bed of a navigable river, from which the waters have disappeared, different from the rule declared by the Supreme Court of Tennessee does not appear in the bill, although it is manifest that the application of such rule by the Supreme Court of Tennessee to the old bed of the river resulted in the location of the boundary line therein, at the *locus in quo,* as decreed by the court.

From the silence of the bill as to the position or contention of plaintiff on this controlling principle, are we not warranted in assuming that there is no difference, much more no controversy, between the States in respect thereof?

Moreover, are we not further justified in reaching this conclusion because the application of this equitable rule of property restores to plaintiff the full western half of the old bed of the river wherever its lines are susceptible of identification, as by the Humphreys map, notwithstanding deep erosions into her bank with consequent widening of the river and "shifting" of its middle thread.

This rule of property is founded upon principles of purest equity—it restores to the former owner his own and deprives no one of anything belonging of right to him.

As said by the Supreme Court of Tennessee in State *vs.* Muncie Pulp Company and Cissna, 119 Tenn., 47-133:

> "It restores all parties to their original status and does justice to them all. If the result of the avulsion had only affected the waters of the river, so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupied the channel as it existed in 1823, it would not be denied that the line would now be in the center of the bed as it was in 1823. That the old bed was abandoned cannot change the rights of the parties. The others interested cannot be restored to their own by the forces of nature and Tennessee eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of her property, when the same can be without doubt identified and located."

If the rule were different, either State might be squeezed out of her equal share in the original bed of the river, between the claims of the riparian proprietors restored to their original property lines on the river bank and the claims of the other State to a line, as a boundary, in the middle of a channel whose width had been doubled by erosion altogether into one bank of the river.

To illustrate: Suppose the original width of the Mississippi river at the *locus in quo* had been one mile and by gradual processes of erosion into the Arkansas bank had been increased until its width was two miles, so that the middle thread of the river was immediately above the original Arkansas shore, and then came an avulsion by which the entire channel of the river was changed, followed by the emergency of the entire original bed from the waters. There can be no doubt but that the lands belonging to the riparian proprietors which had been covered by the waters during the process of erosion would be restored to them, if the shore lines thereof could be identified, and if the result of the avulsion were to fix the boundary line at the middle thread of the widened river immediately above the original Arkansas shore line, as though a plummet had dropped there at the instant of the avulsion, it is manifest that the entire share of Arkansas in the old bed would be thus pressed or squeezed out between these conflicting claims and that she would be restored to nothing, but lose everything by the avulsion.

The doctrine that produces such results needs but to be stated to demonstrate its utter unsoundness and wanton injustice.

Therefore, we submit that there are good reasons why plaintiff does not controvert the soundness and justice of the rule of property applied by Tennessee in the case referred to in the bill in this cause.

Further, we respectfully insist that the decision of the Supreme Court of Tennessee that the boundary line between the States is a line equidistant from the visible, well defined and substantially established banks of the river is not only a sound construction of the treaties, legislative acts, both State and Federal, etc., but is in harmony with the laws of Arkansas and the decisions of her Supreme Court (of which the Supreme Court of Tennessee takes notice) in relation to the location of her eastern boundary.

Or, to state this proposition somewhat differently—"the middle of the Mississippi River" declared by the treaties, legislative acts, etc., aforesaid to be the western boundary of the State of Tennessee and "the middle of the main channel of the Mississippi River," declared by treaties, legislative acts, etc., to be the eastern boundary of the State of Arkansas, mean the same thing as construed by the supreme courts of both States, and these decisions make a rule of property for these States in respect of said boundary line.

In Cessill *vs.* The State, 40 Ark., 501, decided in 1883, it appeared that Cessill had been convicted for unlawfully selling liquor on a boat permanently anchored on the Mississippi river off the Arkansas shore. The theory of the defense was that the place of sale was not in that State, but east of her eastern boundary. The court below in effect instructed the jury upon the theory that the "middle of the main channel of said river" was the ***mid***

line of the channel of commerce, but the Supreme Court of Arkansas rejected this theory as unsound and held that the "middle of the main channel of the Mississippi river," designated in the act of Congress admitting Arkansas into the Union, and in the several constitutions of that State, as its eastern boundary, means "the point or line along the river bed equidistant from the permanent and well defined banks" of the river—and not the middle line of the channel of commerce.

While the question of the ownership of submerged lands appearing above the water is not involved in Cessill's case, yet it would seem that the principle underlying the rule in relation thereto followed by the United States Circuit Court of Appeals (119 Fed. Rep., 812, 831-2), and applied by the Supreme Court of Tennessee, as hereinbefore shown, was recognized by the Supreme Court of Arkansas, because, in discussing the question of boundary and holding that the "channel of the Mississippi river meant its bed between the well defined banks on either side, the court said:

> "For if the main body of the water were to find a new channel, and abandon the old one, leaving intervening lands in a natural state, the old boundary would be still ascertainable and would govern."

So, we submit, by the laws of both plaintiff and defendant each is entitled to an equal share in this

great river and in the bed thereof and when the avulsion came and the stream sought and found a new channel it did not carry the boundary line with it—and that is what is meant by the statement found in the decisions and text-book to the effect that the boundary is not changed by an avulsion; and as the lands in the old bed emerged from the shallowing waters the several properties were restored to their original owners. To Arkansas was restored the land on her side from *high-water mark* (that being the rule of property in Arkansas, Railroad *vs.* Ramsey, 53 Arkansas, 314) in 1823, to the middle thread of the river in that year: Tennessee regained on her side from *low water mark* to the mid-channel of 1823; and the original riparian owners on both banks recovered the lands lost to them by erosion to the original lines of their several tracts.

Therefore, we repeat, no direct issue, no controversy is shown to exist between these States.

It is true a controversy is shown to exist between Tennessee and one W. A. Cissna, who claims as accretions to Dean's Island a considerable tract of land, which *he also claims,* and the bill in that connection alleges, lies on the Arkansas side of the main channel of the river as it run in 1876. He is in possession of this land and as shown in Stockley *vs.* Cissna, 119 Tenn., 135, 177, *he further claims* that this alleged accretion extends not only beyond the Tennessee shore line of 1823, but over and upon the lands of riparian owners on the Tennessee side,

whose lands swept away by erosion were restored as the result of the avulsion in 1876.

It is true this cause stands upon bill and demurrer, but this court will read into the bill, and consider it in the light of, the decision of the supreme courts of these two States, from all of which we respectfully submit that the fair inference is that this bill filed in the name of the State of Arkansas was not brought to have determined by this court in the exercise of its high and delicate jurisdiction any real *controversy* between the States but rather to vindicate the supposed grievances of W. A. Cissna, whose pet theory was in effect rejected by the Circuit Court of Appeals and whose claim that there had been accretions (119 Tennessee, 115) to Dean's Island, upon full proof and careful investigation was denied by the Supreme Court of Tennessee.

The litigation between the State of Tennessee and Cissna has now been pending since 1903, and the court can see from the opinion of the Supreme Court of Tennessee that full proof on the questions at issue was adduced. This court cannot know what witnesses examined in that case are now living, but it is not improbable that, in the course of nature, many of them may have died so that their testimony might not be available in this case.

If Cissna is injured by the judgment and decree of the Supreme Court of Tennessee, may he not have that judgment reviewed by this court on writ of error?

Tennessee has no controversies with Arkansas—but with Cissna.

In conclusion, we submit:

IV.

That it does not appear that the bill was filed or is being prosecuted by the authority of the State of Arkansas.

It is with no small degree of reluctance that we challenge the authority for the filing and prosecution of this bill, signed as it is by the Attorney General of Arkansas.

But in a case of this importance, seeking to invoke the "high and delicate jurisdiction of this court" to determine a *controversy between two States,* something more, we respectfully submit, ought to appear than merely the signature of the Attorney General to the bill, which in this case is not even sworn to.

If the bill had been signed by the Governor, the Chief Executive officer of the State, it might fairly be presumed to have been filed by the authority of the State. It contains no allegation that it is filed by the direction or under the sanction of either the legislative or executive branch of the government of Arkansas or of any law of that State.

It is not shown that it is within the authority of the Attorney General, upon his own motion, to bring suit against the State in this court.

A bill invoking the jurisdiction of this court to determine a controversy between two States should show on its face, in some form, State action and authority for seeking to bring before this court one of the States of this Union to meet that issue—*a fortiori*, where the State sought to be made a defendant has no notice of the existence of any controversy—any direct issue—and there had been no effort to accommodate any such issue.

Respectfully submitted,

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 7, Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

ANSWER OF DEFENDANT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the State of Tennessee, one of the United States of America, by Ben W. Hooper, Governor, and Charles T. Cates, Jr., Attorney General, by leave of this honorable court, to the original bill of complaint filed against said State of Tennessee by the State of Arkansas by and through her Attorney General.

This respondent, saving to herself the benefit of all proper exceptions to said bill, for answer thereto, or so much thereof

as she is advised is material or necessary for her to answer answering says:

1.

It is true that the western boundary of the territory ceded by the State of North Carolina to the United States in 1790, and which was admitted into the Union by act of Congress on June 1, 1796, as the State of Tennessee, was "the middle of the Mississippi River."

2.

At the time the defendant State of Tennessee was admitted into the Union, with her western boundary fixed at "the middle of the Mississippi River," as aforesaid, the other half of said river and the territory immediately adjacent thereto belonged to France, from whom it was acquired by the United States in 1803 as a part of the Louisiana purchase, and subsequently erected into what was called the Territory of Arkansas.

It is true, as alleged in the second paragraph of the bill, that in 1836 the State of Arkansas, complainant herein, was admitted into the Union, with its eastern boundary fixed at "the middle of the main channel of the Mississippi River" as it then flowed.

3.

The general course of the Mississippi River, as it flowed in and prior to 1836, between the States of Tennessee and Arkansas, from Pecan Point to Brandywine Point, may be stated with approximate accuracy in the third paragraph of the bill, but respondent reserves the right to correct any material error in said description to make it accord with the facts, if the same can now be ascertained.

It is true that in 1874, under the direction of the War Department of the United States, Col. Charles R. Suter made a steamboat reconnaissance of the Mississippi River below

the mouth of the Ohio, and your respondent is informed that thereafter the said Suter filed in said Department a map prepared by him and his assistants, purporting to show the result of their reconnaissance; but said map was not intended to show, and did not show, with any degree of accuracy, the location of the banks of the river at that time, but was intended to illustrate in a general way the result of the observations of the said Suter and his assistants from the deck of the steamboat upon which they passed up and down the river, then at the lowest recorded stage of water—which observations included mere estimates, without actual measurement of the width of the river or the distance between the permanent banks or between the islands and the mainland on either shore.

It is true that the earliest recorded survey of the Arkansas side of what, in her bill, complainant calls the *locus in quo*, was made in 1823, under the authority of the United States, and a map constructed by Major J. H. Humphreys, a civil engineer, from said survey and plat thereof made in 1823 and from calls and plats of Tennessee surveys and grants of lands on the Tennessee side of the then channel of the river, shows the location of the shore or bank lines on both sides of the river and of the islands therein at or about the year 1823, and also in 1836, when Arkansas was admitted into the Union, and is herewith exhibited and made a part of this answer as Exhibit A.

Further answering the third paragraph of the bill, respondent denies that any such changes in the location of the permanent banks of the Mississippi River and of the islands therein had occurred between 1823 and 1874, as is alleged in the bill and claimed to be shown by the reconnaissance sketch prepared, as aforesaid, by Colonel Suter and his assistants.

Further answering the third paragraph of the bill, respondent denies that prior to 1874 there had been any accretions to the west of Dean's Island, or any erosion into the Tennessee shore opposite, or that the main channel of the

Mississippi River, or the channel of commerce of said river, had been changed or deflected from around the north of Island 37 to between said island and the main Tennessee shore, as alleged in the bill.

4.

It is true that on the 7th day of March, 1876, the Mississippi River suddenly broke through and crossed the neck of the peninsula immediately across and southwest from Dean's Island, and formed for itself a new channel, gradually drawing the water from the old channel, which, in course of time, became dry land suitable for cultivation, and to a great extent covered with timber. This avulsion was graphically described in the opinion of the Circuit Court of Appeals, speaking through Judge Lurton, in the case of Stockley *vs.* Cissna, 119 Fed. Rep., 821-2, as follows:

> "The sudden change in the channel made in 1876, by which the river abandoned its long course around the bend known as the 'Devil's Elbow,' and cut a new, straight, and short channel across the neck of that bend, did not operate to change the boundary between Tennessee and Arkansas. The new channel was the result of a sudden and uncontrollable change in the direction of the main current of the stream. In cutting the new channel, some 2,000 acres of cultivated river bottom land was washed away in the course of about 60 hours. Within that time a new channel, some 20 to 40 feet deep, in ordinary water, was permanently established; being the channel now known as 'Centennial Cut-off.' This channel shortened the distance around the bend some 15 miles. As another direct result, the old channel of the river, so long the boundary between the two States of Tennessee and Arkansas, was completely deserted by the river, and in a short time became dry land. Thousands of acres of dry river bottom within the jurisdiction of Tennessee, as land lying on the east side of the main channel of the river, were by this sudden formation of the new channel placed upon the west

side of the Mississippi River; and the inhabitants of nearly an entire civil district of Tipton County, one of the counties of Tennessee lying on the Mississippi river, found themselves living on the west, instead of the east, side of the great river."

After the decision in Stockley *vs.* Cissna, as will be hereinafter more fully shown, the same part of the *locus in quo* became the subject of litigation in the courts of Tennessee in the case of State of Tennessee *vs.* Muncie Pulp Company *et al.*, reported in 119 Tenn., pp. 61-62, and said avulsion occurring on March 7, 1876, is described in the opinion of the Supreme Court of Tennessee as follows:

"Upon the date referred to, March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, then reduced in width to about a mile, which new and shorter channel, thus made, it continues to occupy to this time. The new channel was called the 'Centennial Cut-off,' and the island made by it 'Centennial Island.' The change of the channel, as stated, was sudden and violent. About two thousand acres of valuable cultivated lands were swept away, with the farm-houses, gin-houses, and other improvements upon them, in a few hours, and the inhabitants with difficulty saved their lives and personal property. The old channel around the bend of the elbow was abandoned by the current of the river, but remained, for a few years, covered with dead water, becoming a lake or lagoon. It was no longer navigable, except in time of high water for small boats, and this continued only for a short time. The fall in the river around the elbow, from six to eight feet, was all condensed in the one mile of the cut-off, and made a strong current there. This, of course, drew the water from the old channel rapidly, and greatly reduced its depth. The old bed immediately began to fill with sand, sediment, and alluvial deposits, and bars formed in it. It became dry land, cottonwood and willow trees began to grow upon it,